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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARY MKRTICHIAN, Plaintiff and Appellant, v. SARKIS NOURIAN, Defendant and Respondent.	B220929 (Los Angeles County Super. Ct. No. BC374583)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Offices of Daniel V. Behesnilian and Daniel V. Behesnilian for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

After this action, based on an alleged fraudulent transfer of real property, had been pending for about 14 months, the parties, on or about September 24, 2008, agreed to and filed a stipulation for binding arbitration including a provision that the arbitration would be completed by March 31, 2009. Plaintiff, in accordance with the terms of the stipulation, and the court order made thereon, dismissed her action contemporaneously with the filing of the stipulation (i.e., September 24, 2008).

The arbitration was never held. On July 28, 2009, plaintiff moved to set aside the dismissal of her action. Such relief was sought based upon Code of Civil Procedure, section 473, subdivision (b) (section 473(b)). Plaintiff argued that the arbitration was not held due to *excusable neglect* by the plaintiff *and* the *neglect* of her attorney. The trial court denied the motion on the principal ground that the motion for relief from the dismissal was filed more than six months after the dismissal was thus no relief was available under section 473(b).

Our review of the record herein fails to demonstrate any abuse of the trial court's discretion. We will therefore affirm the order denying relief.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this action on July 20, 2007 alleging fraudulent misrepresentation by the defendant with respect to the conveyance of a parcel of real property.[1] The parties engaged in discovery and other pretrial activity until September 24, 2008, when

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[1] The record on appeal does not include a copy of plaintiff's complaint. Our very limited understanding of her claim is based on the characterization of her claim in the documents filed in support of and in opposition to, the motion for relief which is the subject of this appeal.

they agreed to and filed a stipulation providing for resolution of plaintiff's claim by final and binding arbitration.

In relevant part, the stipulation provided: "(1) That the above-captioned matter be submitted to Binding Arbitration for final conclusion. [¶] (2) That the parties will use the services of a mutually agreed upon arbitrator, who will be chosen/agreed upon as soon as possible. [¶] (3) That the binding arbitration be completed by March 31, 2009. . . . [¶]. . . . (6) That the order of the arbitrator shall be final and shall not be subject to appeal, attack or set aside as other than provided in California Rules of Court, Rule 1615. [¶] (7) That the arbitrator's award shall have the effect of a settlement between the parties and the Court shall retain, at all times, jurisdiction over any settlement agreement and/or arbitration award with respect to the enforcement of such agreement/award relative to this instant matter. The parties retain the right to petition the Court to confirm any settlement/arbitration award, if necessary, as provided in CCP Section 1285 et seq. [¶] (8) That upon the Court signing the order which is part of this Stipulation for Binding Arbitration, the instant lawsuit will be dismissed with the Court to retain jurisdiction over this matter until completion/finalization of the arbitration hearing and receipt of the arbitration award, and for enforcement of any settlement agreement/arbitration award. . . . "

The stipulation included an order that was contemporaneously signed by the trial court: "It is hereby ordered that the case of Mkrtichian v. Nourian, bearing case number BC374583 will be concluded through binding arbitration, as agreed between the parties.

Accordingly, the case is dismissed forthwith, with the court to retain jurisdiction. ¶ All future dates are vacated."

Thereafter, plaintiff took no action to select an arbitrator or commence arbitration proceedings. The defendant, on October 22, 2008, submitted a written proposal that the parties agree to the Hon. Marvin Rowen (a retired Los Angeles Superior Court Judge) as the arbitrator. Plaintiff did not respond and defendant sent a follow up letter on October 30, 2008. Plaintiff did not respond to this letter either until November 18, 2008.[2] In his response, plaintiff's counsel rejected Judge Rowen and instead suggested the names of three other private judges associated with Alternative Resolution Centers (ARC). Defendant promptly replied on November 24, 2008 that while none of those three names were acceptable, the services of ARC were. Defendant suggested another of the ARC neutrals, the Hon. Richard Kolostian (also a retired Los Angeles Superior Court Judge).

Plaintiff's counsel did not provide a written response to defendant's November 30 letter until May 4, 2009 (nearly 45 days after the March 31, 2009 deadline). In this reply, a paralegal employed by plaintiff's counsel indicated no more than that the defendant's proposal was one "which we may agree to." But she also

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[2] This was the last (and only) communication received from the plaintiff until *after* the expiration of the stipulated March 31, 2009 deadline for *completion* of the arbitration.

indicated that she did not know the name of the judge (i.e., Judge Kolostian) that had been set out in defendant's letter of November 30, 2008.[3]

There then followed an exchange of letters in which defendant's counsel placed the blame entirely on plaintiff and her attorney for not proceeding with the schedule mandated by the court approved stipulation. Plaintiff's counsel responded, essentially, that it was all a matter of miscommunication. Finally, on June 4, 2009, defendant's counsel sent a letter rejecting plaintiff's view of the events and bringing the matter to a head. This letter concluded, "[t]hus in light of the clear written exchange between the parties, it is evident that Plaintiff has failed to prosecute her claim in a timely manner, and has not complied with the Order made by the Court prior to the case being dismissed. Should you wish to discuss this further, you are welcome to contact me, however in the interim, we consider this matter closed."

Again, on June 5, 2009, defendant's counsel wrote to plaintiff's counsel that, "[n]o response was received by your office with respect to Judge Kolostian, and no attempts were made by you to revive the process until after the deadline had passed. Thus we consider this matter final."

On July 29, 2009, over *ten* months after the order of dismissal had been filed in the matter pursuant to the stipulation of the parties, plaintiff filed a motion to vacate and set aside that dismissal. She argued that she was entitled to do so under section 473. The defendant opposed the motion on the grounds that the motion was both untimely

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[3] This does not speak well for the filing system utilized by plaintiff's counsel.

and failed to demonstrate any excusable neglect for the plaintiff's failure to pursue the agreed upon arbitration process.

The trial court agreed with the defendant and denied the motion. Plaintiff has filed a timely appeal.[4]

ISSUES

The principal issue presented arises from the ground on which the trial court denied plaintiff's motion. Given the clear provisions of section 473, can any relief be granted in light of plaintiff's failure to seek relief until after the six-month deadline set out in section 473? We answer that question in the negative.

DISCUSSION

Plaintiff's motion is untimely. Section 473(b), expressly provides that a court may "relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." However, the application for such relief "shall be made within a reasonable time, *in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken*." (Italics added.)

This quoted provision is part of the discretionary authority granted to a trial court by section 473(b). There is, in the same section, a mandatory provision that directs a court to grant relief to a party whose attorney's "mistake, inadvertence, surprise, or neglect" has resulted in the dismissal of the client's action. Unfortunately for plaintiff,

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[4] No respondent's brief has been filed by the defendant in this matter.

however, there are two requirements imposed by section 473(b) in order for this mandatory provision to be applicable. First, the attorney must submit his or her sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect. Second, the application for relief *must be made no more than six months after entry of judgment or dismissal*.

Thus, whether the discretionary or mandatory provisions are relied upon, the motion for relief *must* be filed within six motions of the dismissal from which relief is sought. This deadline is strictly enforced. (See *Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 345.)

As noted, plaintiff's motion was filed over *ten* months after the order of dismissal was filed. There is thus no basis for application of either the discretionary or the mandatory provision in section 473(b). To avoid this conclusion, plaintiff argues that the mandated "six-month period" should be measured from March 31, 2009, the date by which the stipulated arbitration was to be completed. Apart from its convenience to plaintiff's argument, however, there is no legal reason to consider that date. Under the plain language of section 473(b) the only relevant date is September 24, 2008, the date when the trial court signed the order of dismissal.[5]

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[5] As this conclusion is dispositive of the appeal, there is no need to consider any other arguments advanced by appellant.

DISPOSITION

The order is affirmed.[6]

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

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[6] As respondent did not file a brief or appear in this matter, there is no reason to make a cost award.